1998

State of Utah v. Larry G. Bohne : Reply Brief

Utah Court of Appeals

Scott M. Burns; Iron County Attorney; Jan Graham; Utah Attorney General; Attorneys for Plaintiff/Appellee.

J. Bryan Jackson; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

* *

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 981526-CA
LARRY G. BOHNE,	)	Argument Priority: (15)
Defendant/Appellant.	)	

* *

REPLY OF APPELLANT BOHNE

Appellant BOHNE's reply to Appellee's Brief regarding an appeal from a Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Certificate of Probable Cause, filed August 3, 1998, by the Fifth Judicial District Court of Iron County, State of Utah, the Honorable Robert T. Braithwaite, presiding.

SCOTT M. BURNS
IRON COUNTY ATTORNEY
97 North Main, Suite #1
Post Office Box 428
Cedar City, Utah 84721-0428

JAN GRAHAM
UTAH ATTORNEY GENERAL
Heber Wells Building
160 East 300 South, 6th Floor
Post Office Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

J. BRYAN JACKSON, (4488)
J. BRYAN JACKSON, P.C.
157 East Center Street
Post Office Box 519
Cedar City, Utah 84721-0519

Attorney for
Defendant/Appellant Bohne

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J. BRYAN JACKSON, (4488)
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Cedar City, Utah 84721-0519

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I.

JURISDICTION

Appellee agrees with Appellant that jurisdiction is appropriate before the Utah Court of Appeals pursuant to Utah Code Annotated § 78-2a-3(2)(e) (1953, as amended).

II

STATEMENT OF FACTS

The parties appear to be in agreement as to the Statement of Facts which are generally comprised of the stipulated facts agreed to by the parties and submitted to the trial court together with testimony where each side testified as to their interpretation and understanding of the law and regulatory scheme.

III.

RESPONSE TO AND CLARIFICATION OF ARGUMENTS

POINT NO. 1:

THE "CONSTRUCTION TRADES" DOES NOT INCLUDE AND IN FACT IS EXPRESSLY EXCLUDED FROM THE DESIGN, MANUFACTURE, ASSEMBLY OR CONSTRUCTION OF PERSONAL PROPERTY

Given the direction of Appellee's argument on "construction trades", it seems imperative that a clear understanding be reached as to what the Legislature intended by the use of the term. Unlike the term "personal property" which is not defined in the pertinent statutes cited in the briefs of Appellant and Appellee, the term "construction trades" is statutorily defined and contains what Appellant believes to be a limitation intended by the Legislature for regulatory purposes. The definition is limited by its exclusion of personal property. As set forth in Appellee's brief it is found at Utah Code Annotated § 58-55-102(5) (1953, as amended), and states:

> (5) "construction trade" means any trade or occupation involving construction, alteration, remolding, repairing, wreaking or demolition, addition to, or improvement of any building, highway, road, railroad, dam, bridge, structure, excavation or other project, development or improvement to other than personal property. (emphasis added.

Perhaps as significant is the absence of a more limited or restrictive definition for "personal property" within this definitional section of the code. It is Appellant's contention that if the Legislature intended to include modular construction within

the regulatory scheme put forth by Appellee requiring that such manufacturers be licensed as building contractors that a first and essential step would have been to define or restrict the term "personal property" to mean something other than its general and accepted meaning or to include those types of construction of personal property within the regulatory scope of construction trades.

What is further remiss from Appellee's brief is a citation to any judicial authority attempting to define the term "personal property" or "construction trades" to include activities similar to Appellant within the regulatory control of the Division of Professional licensing although Appellant does note that some administrative rulings of the Division have attempted to do so.

POINT NO. 2:

APPELLEE MISCONSTRUES APPELLANT'S CHALLENGE TO THE DIVISION'S INTERPRETATION OF THE STATUTE.

Appellee seems to infer from its argument that the Appellant is attempting to challenge the statutes in question. On the contrary, Appellant contends that these statutes are clear and unambiguous and convey a plain meaning which is inconsistent with the interpretation put forth by the Division of Professional Licensing. The Appellant contends that a reasonable interpretation of the statutes must include the plain meaning of "personal property" which meaning extends to and includes forms of personal property other than those that could be characterized as "Sears exceptions" or vehicles licensed with the Department of Motor Vehicles. In short, the Appellant does not challenge the language of the

various statutes as promulgated by the Legislature but the Division's restrictive and somewhat tortured interpretation for regulation purposes.

POINT NO. 3:

APPELLEE FAILS TO DEMONSTRATE HOW THE STATUTORY USE OF THE TERM "PERSONAL PROPERTY" RENDERS THE STATUTES AMBIGUOUS OR LEADS TO AN UNREASONABLY CONFUSED, INOPERABLE OR BLATANT CONTRADICTION OF THEIR EXPRESS PURPOSE.

The Appellant and Appellee have set forth the well settled rules for statutory construction in Utah which seek to interpret statutes by utilizing the plain meaning of their words. See State v. Cox, 826 P.2d 656, 662 (Utah App. 1992). See also World Peace Movement v. Newspaper Agency Co., 879 P.2d 253, 259 (Utah 1994). As has been stated previously, the Utah Courts assume that each term in a statute is used advisedly; thus the statutory words are read literally, unless such reading is unreasonably confused or inoperable. As noted in Appellee's brief, only if the language of a statute is ambiguous do the Utah Courts resort to other modes of construction. However, Appellee fails to demonstrate how the Legislature's use of the term "personal property" renders the meaning of the statute ambiguous. Appellee further contends that a corollary to the rule is that a statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute. Appellant agrees. However, Appellant contends that Appellee has failed to

demonstrate how an interpretation of the statute utilizing the plain meaning of "personal property" renders this statute confusing, inoperable or in blatant contradiction of its express purpose. To the contrary, the Appellant contends that the statutory language as promulgated is clear, decisive and definitive in expressing the Legislature's intent to regulate the construction trades through licensing and exempt certain similar activities that include a person engaged in the sale or merchandising of personal property that by its design or manufacture may be attached, installed or otherwise affixed to real property who has contracted with a person, firm or corporation licensed under this chapter to install, affix or attach that property. Appellant believes that it is important to point out that this exemption is a qualified one. It requires that such personal property be installed, affixed, or attached by one who is licensed. In the instant case, as set forth in the stipulated facts, paragraph 3, attached to Appellee's Appendix 1, the "[Appellant] transports and delivers the structure by "low-boy" and off loads it at the site. The Appellant does not do the site work, e.g. excavation, foundation, utilities, etc., nor does the Appellant actually install or attach the structure to the foundation. . . installation of the unit becomes the responsibility of the owner or a licensed contractor." In other words, the rationale set forth by the trial court in its Certificate of Probable Cause and reiterated in Appellee's brief that the "exception would swallow the rule" is not true. Since the statute requires that a licensed contractor be involved in the installation or attachment of such property to land, the Appellant is nothing more than a supplier of assembled materials to a contractor. The Appellant contends

that the legislature had the foresight to see that requiring the licensing of a supplier of materials to a contractor would constitute an unnecessary redundancy in the regulatory scheme . Fabrication of quality materials and compliance with the appropriate building codes, the concern that did remain was insightfully addressed by the Legislature in Chapter 56 which was intended to regulate the manufactured housing industry. It assures that such construction meets with uniform and/or federal housing building requirements monitored through inspections. The contractor and local building inspector require inspection certificates to insure that the item of personal property meets with the appropriate building code requirements. In the case of the Appellant, the product does not leave the yard until all inspections have been made. See paragraph 4, of Stipulated Facts, Appellees Brief, Appendix I.

The Appellant contends that the Legislature foresaw that a contractor would be involved in the process at the time of attachment and therefore considered it unnecessary to require the manufacturer of the unit to also be licensed as a contractor under Chapter 56. Consequently, Appellant is not asserting that Chapters 55 and 56 are mutually excluded as asserted by Appellee; rather, Appellant asserts that the two chapters work in conjunction with each other to insure that the one who installs or attaches personal property to real property is licensed as a contractor and the materials received, whether assembled or unassembled, meet with the requirements promulgated under the Uniform Building Standards Act. Such interpretation is plain, clear, and operable for regulatory

purposes and adequately protects the general public from the health and safety issues associated with poor workmanship or poor quality materials.

Appellant contends that notwithstanding Appellee's assertion to the contrary, there is no independent public policy consideration to require licensing of contractors except to afford a reasonable expectation of good workmanship and standard quality materials in the construction of a home. This is accomplished by the present statutory framework that interprets the language consistently with its plain meaning. It does not require the tortured interpretation put forth by Appellee to accomplish the public policy consideration.

POINT NO. 4:

APPELLEE ONLY CONFUSES THE ISSUE BY ATTEMPTING TO DISTINGUISH APPELLANT AS ONE WHO ACTUALLY CONSTRUCTS MODULAR HOMES.

The Appellee attempts to draw distinction by asserting that Appellant is not only engaged in the sale or merchandising of modular homes but actually constructs modular homes. Appellee concedes that he constructs modular homes. He constructs modular homes just as a mobile home manufacturer or a manufactured home manufacturer constructs homes. Like a manufactured or mobile home, the Appellant's products are generally complete and unattached to real property. Notwithstanding, this is all addressed in the regulatory scheme provided through Chapter 56 which distinguishes between mobile homes, manufactured homes and modular construction only for the purpose of determining which building code requirements apply. In Utah Code Annotated § 58-56-3(12)

(1953, as amended) the Appellants particular form of construction or assembly is defined under the term "modular unit". Which requires that Appellant's product conform to the uniform building codes and not the HUD building code.

Moreover, as previously stated, the definition of "construction trade" in Chapter 55 expressly excludes construction of personal property. The attempt by Appellee to disqualify Appellant by classifying the activity as "construction" as opposed to "manufacturing, assembling, or designing" is a non sequitur that adds nothing to the rational or logical interpretation of the Statue or the intended regulatory scheme of the construction trades or building code requirements.

POINT NO. 5:

THE INTERPRETATION OFFERED BY APPELLEE OF "PERSONAL PROPERTY" WOULD RESULT IN THE APPLICATION OF THE STATUTE IN A MANNER THAT WOULD RENDER IT UNREASONABLY CONFUSING, INOPERABLE AND IN BLATANT CONTRADICTION OF ITS EXPRESS PURPOSE.

While Appellant contends that the language of the Statute is plain and consistent with its ordinary use and meaning, the interpretation offered by Appellee is illogical, confusing, and inoperable and extends the regulatory authority of the Division blatantly beyond its express purpose. Appellee offers two (2) explanations as to why the term "personal property" as set forth in Section 305(6), Chapter 55, Title 58, Utah Code Annotated should be limited to exclude Appellant. On the one hand, Appellee contends that the personal property exemption was intended to cover only components such as Sears products which they refer to as part of the

"Sears exception." These would be products such as refrigerators, washing machines, garbage disposals, light fixtures, toilets, sinks, electrical wiring, outlet plugs, circuit breakers, sewer pipes, taps, faucets, etc. Effectively, any item of personal property that could be purchased at a Sears store (or Appellant assumes a similar merchandise store) would qualify under the exemption. This of course limits the statutory meaning of the term "personal property" to a decision to be made by management of a Sears store. Since the Sears catalog has been known to change from year to year, a definition based upon a "Sears exception", is always illusive of clear understanding its in scope and meaning. What is even more confusing, however, is that this rationale is inconsistent with Appellee's second argument of limitation, that of licensing.

The second argument of Appellee is that Appellant should not be excluded from licensing under the personal property exemption because he is not licensed with the Department of Motor Vehicles. Appellee cites to Administrative Rule 156-55a-102(a) which defines personal property to mean "factory built housing and modular construction, as a structure which is titled by the Department of Motor Vehicle, State of Utah, and taxed as personal property."[1] While at the time the Administrative Rule was enacted provision was made for the licensing of modular construction through the Department of Motor Vehicles, a subsequent change in

[1]If there is a factual issue of nonpayment of personal property taxes by Appellant it was not established at the hearing. Appellee presented no evidence and Appellant's testimony was uncontroverted on cross examination that he paid personal property tax on his construction units See Hearing Transcript, Volume II, page 146.

the law exempted modular construction from licensing.[2] See Utah Code Annotated § 41-1a-504(4) (1953, as amended). Since the Administrative Rule was never changed to correspond with the change in the law, the Division now argues that the Rule has a meaning that is exactly the opposite of its previous intention and application which now effectively excludes all modular construction by implying that the same is not personal property. While this form of logic defies a general and accepted understanding of the term, it does nothing to explain why Appellee now believes it has the broadened regulatory authority to require that modular construction in the State of Utah only be done by licensed contractors. There is no express legislative regulatory authority or directive supporting such an interpretation and the application of such regulatory scheme would effectively exclude even what has been identified by Appellee as the "Sears exception". In short, Appellee's interpretation of "personal property" does nothing to clarify the meaning of the statutes but in fact renders the term ambiguous, confusing, inoperable and blatantly contrary to their express purpose.

IV.

CONCLUSION

On the grounds and for the reasons set forth above, and also for those

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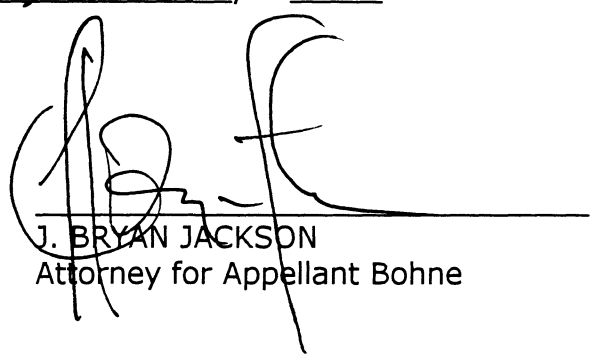
[2]Utah Code Annotated Section 41-1c-504(4), became law in 1992. Prior thereto, provision had been made for the licensing of modular construction as a motor vehicle. The new law exempts modular construction from licensing. However, Administrative Rule 156-55a-102(8) which refers also to modular construction was never changed or amended to reflect this statutory change in the law and thus creates the implication that modular construction should now be excluded from the definition of personal property.

reasons set forth in Appellant's Brief, having replied to Appellees Brief, prays that relief be granted in reversing the trial court's decision, or remanded ordering that judgment be entered consistent with the plain meaning of the statute, together with such other and further relief as to this Court appears equitable and proper.

DATED this 15th day of November, 1999.



J. BRYAN JACKSON
Attorney for Appellant Bohne

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of November, 1999, I did mailed a true and correct photocopy of the REPLY OF APPELLANT BOHNE, by way of U.S. mail, postage fully prepaid, thereon, to the following:

SCOTT M. BURNS
IRON COUNTY ATTORNEY
97 North Main Street, Suite 1
Post Office Box 428
Cedar City, Utah 84721-0428

JAN GRAHAM
UTAH ATTORNEY GENERAL
Heber Wells Building
160 East 300 South, 6th Floor
Post Office Box 140854
Salt Lake City, Utah 84114-0854

COURT OF APPEALS
450 South State Street, Suite 500
Post Office Box 140230
Salt Lake City, UT 84114-0230

Mindi Peterson